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creditors, decide what is reasonable, and the act gives the court no power to review their action. The stay ordered to be entered by the court must be in precise conformity to that reported as the terms of the agreement of the creditors. We cannot say that the act is constitutional as to such agreements as we deem reasonable, and unconstitutional as to such as we think unreasonable. Such a matter cannot be the subject of judicial discretion. We have no power to do what the legislature have not done—annex a proviso that the stay shall not exceed a certain limit. If it be true that the legislature may grant a reasonable stay, it is not reasonable to leave it to the decision of a majority in number and two-thirds in value of the creditors—a tribunal not recognized by law, and which may be unduly influenced in favor of the debtor. It must be competent for the plaintiff in each case to deny the *bona fides* of the assenting creditors; yet no provision is made by the law for the decision of that question, unless it be by the prothonotary, and no power of revision is given to the court over his determination.

On the whole, we are of opinion that this provision of the stay law is so clearly and palpably unconstitutional, that we ought not to refer the case before us to the Prothonotary.

Rule discharged.

In the New York Superior Court—Special Term.

IN THE MATTER OF WILLIAM H. DOBBS, A MINOR.

1. Under the act of Congress relating to the Military Establishment of the United States, the enlistment of a minor without the consent of his parent or guardian, is void, and he can be discharged by the State authorities upon writ of *habeas corpus*.
2. *Phelan's Case*, 9 Abbott, 286, dissented from.

The opinion of the Court, in which the facts fully appear, was delivered by

MURRAY HOFFMAN, J.—Upon *habeas corpus*, the return of an officer of the United States Army is, that the party detained was enlisted in the Army of the United States, on the twenty-eighth

day of March last, for the period of five years; had received advance, clothing, &c., to the value of \$39.

Henry Dobbs, being examined upon this return, deposed that he was the father of the party detained; that his son was a minor, having been born on the 26th of February, 1841; and that he had not given his consent to the enlistment in any form or manner whatever; and, also, that he, the father, was a citizen of the United States, domiciled in Newark, New Jersey.

On these grounds the discharge of the party is applied for.

Congress has power, under the Constitution, to raise and support armies, article 1, sect. 8, sub. 11, and "to make rules for the government and regulation of the land and naval forces," *Ibid.* sub. 13, and generally "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

By the 11th section of the law of Congress of the 16th of March, 1802, vol. 2 Statutes at Large, p. 134, entitled "An act fixing the military peace establishment of the United States," after declaring that the recruiting officers should be entitled to receive for every able-bodied citizen who should be enlisted for five years, between the ages of eighteen and thirty-five years, the sum of two dollars, enacted as follows: "Provided, that no person under the age of twenty-one years shall be enlisted by any officer, or hired in the service of the United States, without the consent of the parent, guardian, or master first had or obtained, if any he have." It proceeds to impose a penalty for violating this provision.

An act of April 12, 1808, (although considered obsolete, apparently expired by the limitation of the term of service provided in it,) may be usefully referred to. By sect. 5, 2 Statutes at Large, p. 481, 483, the provisions of the act of 1802, "fixing the military peace establishment of the United States," relating, among other things, "to the regulation and compensation of recruiting officers, age, size, qualifications, and bounties of recruits," were applied to all persons and things within the intent and meaning of said act, the same as if they were inserted therein at large."

The act of 26th June, 1812, vol. 2 Stat. at Large, p. 764, "for the more perfect organization of the Army of the United States," is

referred to on account of its adoption in the next mentioned act. It does not itself contain anything pertinent to the present question.

By the act of January 20, 1813, vol. 2 Stat. at Large, p. 791, entitled "An act supplementary to the act for the more perfect organization of the Army of the United States," it was provided in section five, that the recruiting officer should have a bounty of \$4 for every able-bodied citizen between eighteen and forty-five years, and then proceeded: "Provided, that no person under the age of twenty-one shall be enlisted, or held in service in the United States, without the consent in writing of his parent, guardian, or master, first had and obtained, if any he have."

The act of January 29, 1813, to raise an additional military force, vol. 2 Stat. at Large, p. 794, to raise twenty regiments for one year, contained precisely the same provision, sect. 7. This act has become obsolete.

A further act was passed on the 10th of December, 1814, "making further provision for filling the ranks of the Army of the United States," vol. 3 Stat. at Large, p. 146. The first section authorized the enlistment of any able-bodied men between the ages of eighteen and fifty years: which enlistment shall be absolute and binding upon all parties under the age of twenty-one years, as well as upon persons of full age, such recruiting officer having complied with all the requisitions of the laws regulating the recruiting service."

By section 2, the recruit had four days to reconsider and withdraw his enlistment.

By section 3, so much of the 5th section of the act of the 20th January, 1813, as requires the consent in writing of the parent, guardian, or master, to authorize the enlistment of persons under the age of twenty-one years, was repealed. The act was passed before the peace was known in the United States. Then followed an act of the 3d of March, 1815, entitled "An act fixing the military peace establishment of the United States." By section 1, the military peace establishment shall consist of such proportions of infantry, &c., not exceeding ten thousand men, as the President should judge proper.

By the 7th section, "the several corps authorized by the act shall

be subject to the rules and articles of war, be recruited in the same manner and with the same limitations as are authorized by the act of 16th March, 1802, entitled "An act fixing the military peace establishment of the United States," and the act of 12th April, 1808, entitled, "An act to raise for a limited time an additional force;" the bounty to the recruiting officer was to be the same as it was by the act of April 12, 1808.

I cannot but conclude that, by force of this section of the act of 1815, the provisions of the act of 1802 were restored as to the necessity of a consent by the parent, and restored in the language of that act.

The editor of the edition of the Statutes at Large (Mr. Peters) considers the act of December 10, 1814, to be repealed by this act of 1815, (marginal memorandum.) It probably is so, by the comprehensive provisions upon the same subject in the latter act.

Mr. Ingersoll, in his Digest of 1821, obviously considered the act of 1802 as then in force upon this subject.

In an act of July 5, 1838, vol. 5, p. 256, "to increase the military establishment of the United States," it was enacted, in section 30, "that so much of the 11th section of the act of 16th March, 1802, and so much of the 5th section of the act of 12th April, 1808, as fix the height of enlisted men at five feet six inches, be repealed." This raises a strong if not unanswerable argument that the rest of such sections continued then in force.

I have not found any other statutory provision which bears upon the question until the enactment of 28th September, 1850, hereafter noticed.

Whatever doubts Chief Justice Kent and Justice Story entertained of the right of State courts or judges to hold jurisdiction of the matter, see 1 Mason, 86; 9 Johnson's Rep. 236, our Supreme Court explicitly and fully recognized the power and the duty of the State judges to give a detained party, enlisted under the laws of the United States, the benefit of a *habeas corpus*. In the matter of Carlton, 7 Cowen, 471, 1827, the courts declare that the enlistment of a minor, without consent of his parent or guardian, was void under the act of Congress, and he might be discharged by State authority.

This doctrine has been acted upon by judges of this State, from that time to the present. Indeed, it seems difficult to escape from the imperative force of our own statute as to the writ of *habeas corpus*, and the obligation to issue it. See 3d R. S., 563, sections 21, 26, 30.

Thus it seems to me the duty of considering the question as within our jurisdiction, and the duty to discharge the prisoner on the facts in this case is clear, unless the statute of September 28, 1850, prescribes another determination.

That statute is entitled, "An act making appropriations for the support of the army for the year ending June, 1851," vol. 9, p. 504. The fifth section directs "that it shall be the duty of the Secretary of War to order the discharge of any soldier of the Army of the United States, who, at the time of his enlistment, was under the age of twenty-one years, upon evidence being produced to him that such enlistment was without the consent of his parent or guardian."

I am ready, as now advised, to concede the power of the Congress of the United States, to withdraw the consideration of cases of this description from the control of State courts or judges, and to prescribe the tribunals or officers to whom it shall be exclusively committed. But if the previous statements of the law in our State, independent of this statute, are correct, (and this is beyond dispute,) then I cannot understand how the mere conferring of a power in the matter upon one of the officers of the United States can abolish the right and duty of the State Courts—can, indeed, be anything but a concurrent power.

In an opinion of Mr. Attorney-General Crittenden, of March 28, 1851, vol. 5 of Opinions, p. 313, he considered that the Secretary of War was not bound, by the act of 1850, to discharge a minor who, at the time of enlistment, had neither parent nor guardian; that the minor, having a parent or guardian, and enlisting without consent, is not entitled during his minority to make proof and claim his own discharge. The parent or guardian must concur in the application. The law gives the enlisted minor no capacity to revoke the enlistment.

Mr. Attorney-General Cushing, vol. 6 of Opinions, p. 607, considered that the Secretary of War was not obliged, under the act of

1850, to discharge minors on the application of a parent not domiciled in the United States

The act of January 20, 1813, that of the 10th of December, 1814, and that of 28th December, 1850, are the only statutes cited and commented upon by him. "Taking the acts of 1813, 1814, and 1850 together, as being in *pari materia*, the proper conclusion seems to be that the minor must have a parent or guardian, whose authority was recognized as valid by the law of the place, who had authority to consent or forbid, and to whom the recruiting officer might have applied within the United States for his assent in writing to the proposed enlistment.

I have examined with great care, as well as respect, the opinion of Mr. Justice Hilton, in Phelan's case, 9 Abbott, 286, and which has been followed by Justice Brady in the case of Johnston, and, as I am informed, by some other judges. For the reasons which are before stated, I am compelled to come to a different conclusion from that of the learned judges.

The recruit detained must be discharged.

Jonas B. Phillips for petitioner.

Theodore Hinsdale for the United States.

NOTICES OF NEW BOOKS.

DECISIONS OF HON. PELEG SPRAGUE, IN ADMIRALTY AND MARITIME CAUSES, in the District Court of the United States for the District of Massachusetts, 1841—1861. Philadelphia: T. & J. W. Johnson & Co., 1861.

Mr. Parker and Mr. Adams, who, it seems share the editorship of this volume, though their names do not appear on the title page, have done a good office in collecting the decisions of Judge Sprague. It would not have been well if the labors of twenty years, pursued with such courageous devotion under the pressure of a calamity which to most men paralyses effort and closes the avenues of knowledge, had perished without some memorial of their worth. The deprivation of sight or of its efficient use, is to any professional man a sore affliction; but to a lawyer, perhaps most of all. His eyes are to him, as it were, his servants of all work; and without their active aid, indeed, the performance of the duties of a judge is almost impossible. The search for precedents, the examination of records, the analysis of evidence, require an immediate and constant